

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

TRI-STATE WHOLESALE BUILDING  
SUPPLIES, INC.,

Petitioner

vs.

NATIONAL LABOR RELATIONS  
BOARD,

Respondent

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: **PETITION FOR REVIEW**  
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Case No. \_\_\_\_\_

Tri-State Wholesale Building Supplies, Inc. ("Petitioner") hereby petitions for review of the Decision and Order of the National Labor Relations Board ("Board") in *Tri-State Wholesale Building Supplies, Inc.*, Case No. 09-CA-125950, published at 362 NLRB No. 85, which was issued and served on Petitioner by U.S. Mail on April 30, 2015.

The Board's April 30, 2015 Decision and Order is attached hereto.

WHEREFORE, Petitioner requests that the Court review the above-referenced Decision and Order, set it aside and grant Petitioner such other relief as is deemed just and equitable.

Dated: 5/29, 2015

Respectfully submitted,

TRI-STATE WHOLESALE BUILDING  
SUPPLIES, INC.

By: Edward S. Dorsey

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**CERTIFICATE OF SERVICE**

Edward S. Dorsey, attorney for Petitioner, hereby certifies that he has caused a true and correct copy of the foregoing Petition for Review to be served upon the following via regular United States Mail this 29<sup>th</sup> day of May, 2015:

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**Tri-State Wholesale Building Supplies, Inc. and Gary Larkin. Case 09-CA-125950**

April 30, 2015

**DECISION AND ORDER**

BY MEMBERS HIROZAWA, JOHNSON, AND MCFERRAN

On September 2, 2014, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions with supporting argument, the General Counsel filed cross-exceptions and an answering brief, the Respondent filed an answering brief to the cross-exceptions and a reply, and the General Counsel filed a reply to the Respondent's answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions as amended,<sup>2</sup> to amend the remedy,<sup>3</sup> and to adopt the recommended Order as modified and set forth in full below.

<sup>1</sup> The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In affirming the judge's finding that the Respondent violated Sec. 8(a)(1) by discharging 10 striking employees on January 11 and 12, 2014, we agree that the Respondent failed to prove a mutual understanding between itself and the replacements it had hired that they were permanent. See *Jones Plastic & Engineering Co.*, 351 NLRB 61, 64 (2007). In so finding, we reject the Respondent's contention that there is no evidence the replacements were aware of a strike in the absence of a visible picket, and so would understand they were being hired to permanent jobs. Without deciding the merits of such an argument in other circumstances, we infer from the evidence that at least 4 of the replacements were aware of the strike due to their relationships with employees who worked for the Respondent.

We find it unnecessary to rely on the discussion in footnote 7 in the judge's decision. Further, Members Hirozawa and McFerran express no view whether *Hormigonera Del Toa, Inc.*, 311 NLRB 956 (1993), one of the cases discussed in the footnote, was correctly decided.

We agree with the judge that Aubrey Chase did not make an unconditional offer to return to work on January 9. Because there are no exceptions to the judge's finding that he was unlawfully discharged along with the other strikers on January 11 and 12, we find it unnecessary to pass on whether he made an unconditional offer on January 13.

<sup>2</sup> Because the amended complaint did not allege that the Respondent unlawfully refused to reinstate the discharged employees (other than Chase), and, because reinstatement is, in any event, the appropriate

**AMENDED REMEDY**

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully discharged Sam Allen, Steve Allen, Robert Brockman, Brett Brooks-Patton, Aubrey Chase, Steve Delaney, Jim Jones, Gary Larkin, Andrew Peterson, and Josh Ushry, because they engaged in a lawful economic strike, we shall order it to offer them full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging, if necessary, any replacements, and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), Respondent shall also compensate the unlawfully discharged employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating backpay awards to the appropriate calendar quarters for each employee.

**ORDER**

The Respondent, Tri-State Wholesale Building Supplies, Inc., Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for engaging in an economic strike.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

remedy for the unlawful discharges, we amend the judge's Conclusions of Law to delete Conclusion 2.

<sup>3</sup> We amend the remedy in accordance with *American Linen Supply Co.*, 297 NLRB 137 (1989), to clarify that any replacements currently in positions previously held by the strikers shall be discharged. Additionally, in agreement with the General Counsel's cross-exceptions, we amend the remedy and modify the judge's recommended Order to reflect the Board's tax compensation and Social Security Administration reporting remedies in language consistent with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

## DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

(a) Within 14 days from the date of this Order, offer Sam Allen, Steve Allen, Robert Brockman, Brett Brooks-Patton, Aubrey Chase, Steve Delaney, Jim Jones, Gary Larkin, Andrew Peterson, and Josh Ushry full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and discharging if necessary any replacements.

(b) Make the affected employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate the affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Cincinnati, Ohio facility, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Rea-

sonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 11, 2014.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 9 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 30, 2015

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Kent Y. Hirozawa, Member

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Harry I. Johnson, III, Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

## APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

## FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in an economic strike or other protected concerted activities.

<sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."



WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Sam Allen, Steve Allen, Robert Brockman, Brett Brooks-Patton, Aubrey Chase, Steve Delaney, Jim Jones, Gary Larkin, Andrew Peterson, and Josh Ushry full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any replacements.

WE WILL make those employees whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL compensate those employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of those employees, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

The Board's decision can be found at [www.nlrb.gov/case/09-CA-125950](http://www.nlrb.gov/case/09-CA-125950) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



*Daniel A. Goode, Esq.*, for the General Counsel.  
*Edward S. Dorsey, Esq. (Wood & Lamping LLP)*, of Cincinnati, Ohio, and *Mark R. Fitch, Esq. (Fitch & Spegal LLC)*, of Cincinnati, Ohio, for the Respondent.

#### DECISION

#### STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Cincinnati, Ohio, on July 23, 2014. Gary Larkin filed the charge on April 4, 2014, and the General Counsel issued the complaint on June 11, 2014. The General Counsel

alleges that Respondent, Tri-State Wholesale Building Supplies, Inc., discharged 10 employees in violation of Section 8(a)(1) for engaging in an economic strike. Respondent contends that it legally replaced these strikers.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

Respondent, Tri-State Wholesale Building Supplies, Inc. manufactures patio doors and similar products in Cincinnati, Ohio. Annually, Respondent purchases and receives goods valued in excess of \$50,000 directly from points outside of Ohio at its Cincinnati facility. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

Every year Respondent shuts down its operations between Christmas and New Year's Day. Shortly before Christmas in 2013, Tim Utz, then Respondent's Production Manager, discussed work scheduling and payroll issues with Respondent's president, Kathy Caldon. Caldon told Utz that production employees would be paid for New Year's Day, when they would not work, if they worked on Thursday and Friday, January 2 and 3, 2014.<sup>1</sup> Production employees generally worked 4-10 hour days from Monday to Thursday. Fridays were not regularly scheduled workdays; however, employees sometimes worked on Fridays, but not necessarily a full day.

Utz told the production employees that they would be paid for New Year's Day if they worked on January 2 and 3. The production employees worked on the second and the third. On Wednesday, January 8, Utz brought the company payroll sheets to Caldon. After reviewing them, Caldon told Utz that she had made a mistake. The company had never paid employees for New Year's Day and would not do so for January 1, 2014.<sup>2</sup> Utz communicated this information to the production employees.

A number of these employees became angry. At about 2:15 p.m. on January 8, during or after a break, a number of these employees confronted Utz. He suggested that they leave the plant. They did so and he walked out of the plant shortly thereafter. Before he left, Utz called his boss, Operations Manager Danny Mickle, and told him that 85 percent of the workforce had just left because Respondent was not paying them holiday pay for New Year's Day. At this time, Mickle was taking a group of visitors through Respondent's facility.

<sup>1</sup> Caldon denied that she told Utz that pay for New Year's Day was a quid pro quo for working January 3. Nevertheless, that is what Utz told the production employees. Moreover, this is inconsequential. Employees understood that Caldon wanted them to work a full day on Friday, January 3 and that they would be paid holiday pay for New Year's Day.

<sup>2</sup> Respondent's employee handbook provides that full-time employees with 6 months service receive holiday pay for Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Day, and the week between Christmas and New Year's (maximum 5 days pay).

## DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

On January 8, Utz and production employee Steve Delaney told Mickle that the production employees wanted to meet with Caldon the next morning, January 9. Mickle called Caldon that evening and told her that employees wanted a meeting the next morning. Caldon told Mickle that she had a prior engagement, a meeting with the chief executive officers of other companies, and would meet with employees who reported to work on January 9, at 2:30 p.m. that afternoon. Mickle called Utz and told him that Caldon would meet with the employees at 2:30. He told Utz, pursuant to directions from Caldon, that Caldon would only meet with employees who reported to work on the morning of January 9. Utz told Mickle that the production employees who walked out would not return to work until Caldon met with them. (GC Exh. 8.)

At 6:36 a.m. on the morning of January 9, Tim Utz sent the following text message to Mickle: "The majority of window manufacturing have called in sick today including myself" (R. Exhibit 2. Nine production employees who walked out on January 8), did not report to work on the morning of January 9. This included Steve Delaney, who had worked for Respondent for almost 30 years, Sam Allen, Steve Allen, Robert Brockman, Brett Brooks-Patton, Jim Jones, Gary Larkin, Andrew Peterson, and Josh Ushry. Production Manager Utz also did not report for work. One employee who walked out on January 8, Daniel Showes, did report for work the morning of January 9. He was not discharged. Aubrey Chase, who had worked for Respondent for about 11 years, also reported to the plant on January 9. Chase testified that he returned to work unconditionally, Operations Manager Mickle testified that Chase insisted on speaking with Caldon first. I do not credit Chase's account because I see no reason why Respondent would allow Showes to work and not Chase—if he reported to work unconditionally.

On Friday afternoon, January 10, Respondent decided to replace or discharge the 10 employees who did not report to work on January 9. It retrieved applications from its files and through other contacts solicited applicants for a job fair on Saturday, January 11.

On January 11, Respondent interviewed applicants and made job offers to them, which were contingent on passing a drug screen and background check. That evening Caldon called the ten employees who did not report to work on the morning of January 9 and read them a statement verbatim which was later sent to each of them in the form of a letter dated January 12, 2014.

This letter is to inform you that Tri-State Wholesale has replaced you in your position in order to continue its operations. Please be advised you should not report for work at Tri-State Wholesale for any future shifts as your position has been filled and your employment terminated. In the event an opening becomes available as a result of any replacement employees subsequently leaving the company, we will determine at that time whether you are eligible for a rehire with the company and you may be offered that position. You will be receiving the company's standard separation information. Thank you for your service with Tri-State Wholesale and we wish you success in your future endeavors. (GC Exh. 3.)

On January 13, 2014, Kathy Caldron saw striker Aubrey

Chase, who had reported to work, in Respondent's parking lot. Caldron told Chase he had been replaced.<sup>3</sup>

## The replacement workers

The record establishes that a number of job applicants filled out an employment application for Respondent on January 11. Respondent interviewed and made job offers to 8 or 9 individuals contingent on their passing a drug screen and background check on that date. The employment applications they filled out specifically state "I understand that if I am hired, such hiring will not be for any definite period of time." The employees who were interviewed and offered contingent jobs are as follows:

Montrey S, R. Exh. 7

Shane T, R. Exh. 8. This employee tested positive for marijuana and was terminated on about January 16, 2014 (GC Exh. 7).

Demetrius M (R. Exh. 9): This applicant had a criminal record and it is not clear that he was in fact offered a job (Tr. 186).

Roy W. (R. Exh. 10): This applicant failed one drug test, then passed a second drug screen. Respondent discovered he was legally blind and withdrew its job offer.

Christopher C (R. Exh. 11): This applicant also had a criminal record. It is not clear that he ever worked for Respondent.

James H. (R. Exh. 12): This applicant tested positive for marijuana. On January 16, Respondent concluded that it could not hire him. (GC Exh. 7).

Allen F. (R. Exh. 13): Allen F. completed an application on January 11, but did not fill out a W-4 or consent to perform a drug screen or background check until January 19.

Nathan T. (R. Exh. 14): This applicant also had a criminal record.

Austin S, who is Kathy Caldron's nephew (R. Exh. 15, GC Exh. 6): Although Austin filled out a job application on January 11, he did not complete a W-4 until January 28.

As of January 15, Respondent has not received background checks on Christopher C, James H, Demetrius M, Nathan T, and Roy W. (GC Exh. 5). There is no evidence that any of these 5 applicants ever worked a day for Respondent. None of the applicants interviewed on January 11 were told about Respondent's benefit plans described at page 15 of its employee handbook (R. Exh. 1). They were not told they were being hired as permanent employees nor that they would become permanent employees after an introductory period of 60 days (R. Exh. 1, p. 7).

On January 16, Caldon wrote, "Of the 11 new hires, includ-

<sup>3</sup> She did not tell Chase he had been *permanently* replaced. Chase testified that Caldon told him that he had been fired. Chase did not say anything about the New Year's Day pay issue, therefore I find that he offered to return to work unconditionally on January 13, *Jackson County Commission on Aging*, 339 NLRB 962 fn. 1 (2003). On January 13, Respondent had not made job offers to 10 replacement employees who were able to come to work for it and indeed may have already known that it had not replaced all the strikers. By January 16, Respondent knew that it had replaced no more than 8 or the 10 strikers (GC Exh. 7). Thus, by any measure it was obliged to notify at least Aubrey Chase and offer him reinstatement as of that date.

ing my son Ryan, 5 are working or will be working soon, 2 are out due to positive drug test, 1 is out due to his criminal record, and we're waiting on something for 3 of them," (GC Exh. 7). Thus, this record does not establish that any of replacement workers worked for Respondent prior to Caldon terminating the employment of the 10 strikers. Utz, who was a statutory supervisor, is not protected by the Act.

#### Analysis

The Board has long held that in the absence of a legitimate and substantial business justification, economic strikers are entitled to immediate reinstatement to their prestrike jobs, *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enfd.* 414 F.2d 99 (7th Cir. 1969). One recognized legitimate and substantial business justification for refusing to reinstate economic strikers is that those jobs claimed by the strikers are occupied by workers hired as permanent replacements, *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379 (1967).

However, the economic strikers in this case were not simply replaced. They were discharged.<sup>4</sup> The test for determining whether employees have been discharged is whether the employer's statements would reasonably lead the employees to believe that they had been discharged, *Grosvenor Resort*, 336 NLRB 613, 617-618 (2001). The wording of Respondent's January 12 letter, which was read verbatim to some employees on January 11, most definitely would lead these strikers to conclude that they had been fired. First of all, CEO Caldon told them that they had been terminated. Secondly, by telling the employees that they would not necessarily be entitled to reinstatement if any of the replacement employees left the company, Respondent disabused them of any belief that they were merely being replaced.

Indeed, Caldon's statements and the letter are not consistent with the rights of economic strikers. Economic strikers remain employees under Section 2(3) of the Act and are entitled to reinstatement to fill positions left by the departure of permanent replacements, and to be put on a preferential hiring list if no open positions exist, *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enfd.* 414 F.2d 99 (7th Cir. 1969). Finally, when it turned out that several of the applicants offered employment on January 11 could not be hired, Respondent did not notify any of the strikers that all of them had not been replaced.<sup>5</sup> It was "incumbent" on Respondent to seek them out as positions were vacat-

ed, *Laidlaw*, *supra* at 1369.<sup>6</sup>

A discharged striker is not required to request reinstatement, *Abilities & Goodwill, Inc.*, 241 NLRB 27 (1979); *Grosvenor Resort*, *supra*. Thus, the fact that none of the strikers in this case ever unconditionally requested reinstatement has no bearing on their entitlement to reinstatement and back pay. However, if these strikers were lawfully permanently replaced before they were discharged, their rights to reinstatement and backpay are contingent on the departure of the employees who replaced them, *Hormigonera Del Tora, Inc.*, 311 NLRB 956, 957-958, *fn.* 3 (1993); *Detroit Newspapers*, 343 NLRB 1041 (2004).<sup>7</sup>

Beyond these legal principles there is the issue in this case as to whether some or all of the strikers were in fact replaced. Another Board decision whose soundness is thrown into doubt by the facts of the instant case is *Solar Turbines*, 302 NLRB 14 (1991). In that case the Board held that a replacement worker is hired when he or she accepts an offer of employment that is contingent on the employee satisfying the contingencies of passing a drug or alcohol screen and a background test. In the instant case, Respondent hired at least 9 replacement workers under the *Solar Turbine* test even though most of them failed either the drug test or background check and apparently never worked a day for the Respondent.<sup>8</sup>

#### Respondent failed to prove that if hired permanent replacements for the strikers

Where striker replacements are only temporary, an economic striker who has been discharged is entitled to his or her job back. It is Respondent's burden to prove that the replacement workers hired as permanent employees. To meet this burden Respondent must show a *mutual* understanding between itself and the replacements that they are permanent, *Hansen Bros. Enterprises*, 279 NLRB 741 (1986); *O. E. Butterfield, Inc.*, 319 NLRB 1004 (1995); *Consolidated Delivery & Logistics*, 337 NLRB 524, 526 (2002), *enfd.* 63 Fed. Appx. 520 (D.C. Cir. 2003); *Dino & Sons Realty Corp.*, 330 NLRB 680 (2000). As in *Hansen Bros.*, Respondent herein failed to produce any evidence whatsoever that the replacements understood that they were hired as permanent employees. Not only is there no testimony in this record by the job applicants, it is clear that they were not told they were permanent employees nor were they

<sup>4</sup> Respondent at hearing suggested that the employees who walked out on January 8 were not economic strikers because Tim Utz told them to leave the facility, but appears to have abandoned this argument in its brief. Even if that were so, they were economic strikers on January 9, when they refused to report to work unless Kathy Caldon first met with them over the New Year's Day pay issue. This was clearly a protected work stoppage since Respondent knew that the employees were not sick, but were engaged in a work stoppage to protest Respondent's change of heart with regard to pay for New Year's Day, *Safety Kleen Oil Services*, 308 NLRB 208, 209 (1992); *Toledo Commuter*, 180 NLRB 973, 977-978 (1970).

<sup>5</sup> Caldon's email to Jenna Berkemeyer, a consultant, at 7:14 a.m. on January 10, also shows that Respondent intended to terminate the strikers, rather than replace them (GC Exh. 10), as does Laura Winzler's notes of her conversation with Caldon on January 9 (GC Exh. 9).

<sup>6</sup> An employer need not reinstate an economic striker who has acquired regular and substantially equivalent employment, because such person is no longer an "employee" of that employer, Sec. 2(3) of the Act; *Laidlaw*, *supra*.

<sup>7</sup> I would note that *fn.* 2 in the *Detroit Newspapers* decision is completely inconsistent with the decision in *Abilities & Goodwill* and a line of cases since then regarding the necessity of discharged economic strikers to make an unconditional offer to return to work. The decisions in *Detroit Newspapers* and *Hormigonera Del Tora* are also fundamentally inconsistent with the principles governing the rights of unlawfully discharged employees generally, who are entitled to reinstatement regardless of whether or not they have been permanently replaced.

<sup>8</sup> At p. 18 of its brief, Respondent appears to concede that some of the replacements never worked a day for the company. Since the strikers were fired, not replaced, they were entitled to reinstatement to these open positions regardless of whether or not they offer to return to work unconditionally.

## DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

advised on the benefits accorded permanent employees, such as medical insurance.<sup>9</sup>

Respondent notes at page 12 of its brief that the walkout (strike) was not discussed with the replacements. Thus, they were not told that they would keep their jobs even if the strikers offered to return to work unconditionally.<sup>10</sup> The company appears to argue that since it remained silent about the strike when talking to the replacement workers, it has met its burden of proving that these employees were permanent replacements. I find to the contrary. Respondent has not met its burden of proving that it hired permanent replacements for any of the ten striking employees at the time it discharged them.

## CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(1) on January 11 and 12 by discharging Sam Allen, Steve Allen, Robert Brockman, Brett Brooks-Patton, Aubrey Chase, Steve Delaney, Jim Jones, Gary Larkin, Andrew Peterson, and Josh Ushry.

2. Respondent has been violating Section 8(a)(1) in refusing to reinstate Sam Allen, Steve Allen, Robert Brockman, Brett Brooks-Patton, Aubrey Chase, Steve Delaney, Jim Jones, Gary Larkin, Andrew Peterson, and Josh Ushry to their previous positions.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent, having discriminatorily discharged Sam Allen, Steve Allen, Robert Brockman, Brett Brooks-Patton, Aubrey Chase, Steve Delaney, Jim Jones, Gary Larkin, Andrew Peterson, and Josh Ushry, must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Respondent shall

<sup>9</sup> Respondent's employee handbook states that newly hired employees go through an introductory period of 60 days during which they "may be discharged at any time during this period" if their supervisor concludes that they are not progressing or performing satisfactorily. Although employees remain at-will employees after the 60-day period, the increased chances of discharge and the lack of any discussion of benefits also indicates that the replacements "hired" on January 11 were not hired as permanent employees.

The record does not support Respondent's assertion on p. 7 of its brief that Danny Mickie "briefly described" company benefits. Mickie did not so testify. Moreover, Laura Winzler's equivocal answer to a leading question from Respondent's counsel at Tr. 187 leads me to affirmatively conclude that company benefits, such as medical insurance, were not discussed with any applicant.

<sup>10</sup> Respondent contends that the walkout was not discussed because since the strikers did not picket it, the replacement workers had no reason to be concerned with losing their jobs. However, Respondent was aware of the strikers' rights to reinstatement. Thus, one would expect it to assure permanent replacements that their position would not be in jeopardy if the strikers offered to return to work unconditionally.

file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate Sam Allen, Steve Allen, Robert Brockman, Brett Brooks-Patton, Aubrey Chase, Steve Delaney, Jim Jones, Gary Larkin, Andrew Peterson, and Josh Ushry for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>11</sup>

## ORDER

The Respondent, Tri-State Wholesale Building Supplies, Inc., Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, disciplining, or otherwise discriminating against any employee for engaging in an economic strike.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Sam Allen, Steven Allen, Robert Brockman, Brett Brooks-Patton, Aubrey Chase, Steve Delaney, Jim Jones, Gary Larkin, Andrew Peterson, and Josh Ushry full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Sam Allen, Steve Allen, Robert Brockman, Brett Brooks-Patton, Aubrey Chase, Steve Delaney, Jim Jones, Gary Larkin, Andrew Peterson, and Josh Ushry whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the discharges of Sam Allen, Steve Allen, Robert Brockman, Brett Brooks-Patton, Aubrey Chase, Steve Delaney, Jim Jones, Gary Larkin, Andrew Peterson, and Josh Ushry, and within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay

<sup>11</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.



## TRI-STATE WHOLESALER BLDG. SUPPLY

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due under the terms of this Order

(c) Within 14 days after service by the Region, post at its Cincinnati, Ohio facility copies of the attached notice marked "Appendix."<sup>12</sup> Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 11, 2014.

Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., September 2, 2014.

APPENDIX  
NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in an economic strike or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Sam Allen, Steve Allen, Robert Brockman, Brett Brooks-Patton, Aubrey Chase, Steve Delaney, Jim Jones, Gary Larkin, Andrew Peterson, and Josh Ushry full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Sam Allen, Steve Allen, Robert Brockman, Brett Brooks-Patton, Aubrey Chase, Steve Delaney, Jim Jones, Gary Larkin, Andrew Peterson, and Josh Ushry whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Sam Allen, Steve Allen, Robert Brockman, Brett Brooks-Patton, Aubrey Chase, Steve Delaney, Jim Jones, Gary Larkin, Andrew Peterson, and Josh Ushry for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Sam Allen, Steve Allen, Robert Brockman, Brett Brooks-Patton, Aubrey Chase, Steve Delaney, Jim Jones, Gary Larkin, Andrew Peterson, and Josh Ushry.

WE WILL, within 3 days thereafter, notify Sam Allen, Steve Allen, Robert Brockman, Brett Brooks-Patton, Aubrey Chase, Steve Delaney, Jim Jones, Gary Larkin, Andrew Peterson, and Josh Ushry in writing that this has been done and that the discharges will not be used against them in any way.

The Administrative Law Judge's decision can be found at [www.nlrb.gov/case/09-CA-125950](http://www.nlrb.gov/case/09-CA-125950) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



<sup>12</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."